No. 90-813 and No. 90-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSN., et al.
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, et al.
Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, et al.
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On writ of certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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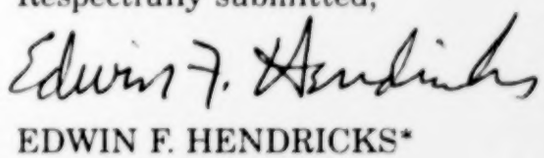
MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

The American Judicature Society was founded in 1913 by Roscoe Pound, John H. Wigmore, and others dedicated to improving the administration of justice throughout the United States. Among its goals, the Society seeks to improve the quality and diversity of state-court judges by promoting merit selection as the method for choosing such judges. The Society has a national membership.

It seeks leave to file an *amicus* brief in this case to call to the Court's attention important facts about merit selection which has been adopted in whole or in part by a majority of states as the method for selecting highly qualified candidates to fill judicial offices.

The Society has undertaken a good faith effort to obtain the consent of all parties necessary to file this brief without motion. Although all parties have orally consented to the filing of this brief, the Society had not received all such consents in writing prior to the printing of the brief. Should the Society receive such written consents prior to filing, it will file the consents with the clerk's office. The Society has not yet received the written consents of The League of Latin American Citizens, Jesse Oliver, and the Attorney General of Texas.

Respectfully submitted,



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March 4, 1991

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BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The American Judicature Society was founded in 1913 by Roscoe Pound, John H. Wigmore, and others dedicated to improving the administration of justice throughout the United States. Among its goals, the Society seeks to improve the quality and diversity of state-court judges by

promoting merit selection as the method for choosing such judges.

The cases before the Court do not concern application of the Voting Rights Act to the merit-based selection of judges, and the Society takes no position on the application of the Act to the selection of judges through at-large, competitive elections. But because the Court's decision might be used to question the validity of merit selection systems now being used in a majority of the states, the Society files this *amicus* brief to inform the Court of the operation and spread of merit selection systems and to explain why the Court should not decide the present controversy in a manner that implicates judicial choice by merit selection.

SUMMARY OF ARGUMENT

Merit selection provides a superior method for selecting state judges. Merit selection systems require state executives to appoint judges from a short list of only the most highly qualified candidates nominated by non-partisan commissions. This procedure increases the quality of state court judges, makes them less susceptible to political influences, results in greater representation of minorities and women on state court benches, and enhances the legitimacy of the courts in the eyes of the public. The benefits of merit selection have led thirty-three states to adopt some form of merit selection in the last fifty years.

The Voting Rights Acts does not apply to merit selection procedures because such procedures are not elective. A system under which the state executive makes judicial appointments from a pool of qualified candidates, as to which citizens have no elective voice, simply does not result in voters of one class receiving "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973 (1988). And, although many merit selection systems grant the public a form of popular

veto over judges through periodic retention elections, neither do such elections result in the election of public representatives within the meaning of the Act because Judges removed through retention elections are replaced by executive appointment, not by popular election. Therefore, in deciding the cases before it, the Court should do nothing to suggest that the Voting Rights Act applies to merit selection of judges by the states.

ARGUMENT

A. Merit Selection Is A Superior Method For Selecting State Judges.

Albert Kales, the Society's first director of research, formulated the original merit selection proposal in 1914. For the next several years the Society refined and expanded the proposal and it was subsequently endorsed by The American Bar Association in 1937. In 1940, Missouri became the first state to adopt merit selection. Under its most traditional form, merit selection calls upon a non-partisan nominating commission to select qualified candidates for a judicial opening. The state executive is required to fill the judicial vacancy from among the limited group of candidates nominated by the commission. Under most merit plans, when the judicial term of office expires and at regular intervals thereafter, the judge is subject to a retention election at which he or she runs unopposed on the basis of his or her judicial record. If the judge is not retained by the public, the vacant seat is filled by appointment through the same merit selection process. American Judicature Society, *Model Judicial Selection Provisions* (1985). This approach to judicial selection preserves the appointment prerogative of the executive and the safeguards of public approval, while ensuring that persons appointed are well qualified for the bench.

Merit selection provides many benefits, the foremost being an enhanced quality of state judges. Non-partisan commissions which nominate judicial candidates under

merit selection systems are charged with seeking out the best judicial talent available. State executives must make their appointments from candidates so identified. This process, while not eliminating political considerations entirely, places greater emphasis on judicial qualifications than an unfettered political appointment system or a general competitive election. A 1979 poll of jurisdictions with merit selection revealed, almost without exception, that judicial quality had improved. American Judicature Society, *Judicial Selection Update: How Commissioners Rate Their Own Judicial Selection Plans* (1979).

Merit selection also makes the judiciary more independent from political influences and public pressure. Judges chosen through merit selection need not initially engage in the overtly political activities of judges selected through public elections, such as campaigning for office, aligning themselves with particular political parties, and soliciting campaign funds. And, because judges appointed through merit selection generally have a greater assurance of extended tenure, political factors and public opinion play less of a role in their decisions.

Merit selection systems also provide more frequent judicial opportunities to minorities and women. Studies recently completed by the Society show that of the 20 black jurists currently serving on state courts of last resort, 10 were chosen through merit selection, 7 through pure appointment by the executive, 2 through legislative appointment, and 1 through popular election. American Judicature Society, *Black Justices Currently Serving On State Courts of Last Resort: Methods of Initial Selection* (September 1990). *See also*, Fund for Modern Courts, Inc., *Success of Women and Minorities in Achieving Judicial Office: The Selection Process* 69 (Dec. 1985) ("merit selection produced the highest percentage of women and minorities to reach the bench of the six methods studied."). In Florida, where appellate judges are chosen by merit selection and trial judges are elected, "nineteen out of twenty-three black judges . . . came to the bench through the merit selection process." Overton, *Trial Judges and Political Elections: A Time For Re-examination*, 2 U. Fla. J. of L. & Pub. Pol'y. 9, 20 (1988-89).

Similarly, of the 35 women currently serving on state courts of last resort, 17 achieved the bench by merit selection, 10 by executive appointment, 4 by legislative appointment, and 4 by public election. American Judicature Society, *Women Justices Currently Serving on State Courts of Last Resort: Methods of Initial Selection* (Sept. 1990); Fund for Modern Courts, Inc., *supra*. In Florida, 41 of 71 women judges came to the bench through merit selection appointment. Overton, *supra*, at 20.

The benefits of merit selection are evidenced by the number of states that have adopted such a system in the last half-century. Missouri began the shift when it established a merit selection system in 1940. Since then, thirty-three states and the District of Columbia have adopted a form of judicial merit selection to choose some or all of their judges.[1] Indeed, with only one exception, every state which has changed its judicial selection system in the last forty-one years has changed to merit selection.[2]

B. Section Two Of The Voting Rights Act Does Not Apply To Merit Selection.

The gravamen of a claim under the Voting Rights Act is that members of a protected class have "less opportunity than other members of the electorate to participate

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[1] The states include Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

[2] The lone exception is Georgia, which switched from partisan to non-partisan elections in 1983.

in the political process and *to elect representatives of their choice*." The Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (1988) (emphasis added). While the Court may determine in these cases that the Voting Rights Act applies to contested, at-large judicial elections, the Act cannot apply to the merit selection of judges. Merit selection systems grant the electorate no direct voice in filling judicial vacancies. Rather, judges are appointed by the executive branch from a pool of candidates nominated by a non-partisan commission. No voter in a protected class has less say about the choice of a judge than other voters. Thus, the Voting Rights Act, by its very terms, has no application to merit-based judicial appointments.

Lower federal courts have so held. In *Williams v. State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988), Illinois voters challenged state methods for selecting judges under section two of the Act. The court found that the complaint stated a claim as to judges who were selected through public elections, but dismissed the claim as to judges who were appointed. The court recognized the fundamental distinction under the Act between systems that fill vacancies through public elections and those that fill vacancies through appointment:

> By its very terms, the Act extends only to mechanisms involved in the election of representatives. However, the people of Cook County do not elect the Associate Circuit Court judges; they are appointed by the regular Circuit Court judges. Because Associate Circuit Court judges are not elected representatives of the people within the plain meaning of the Act, we hold that the plaintiffs cannot challenge the appointment of Associate Circuit Court judges. Though the plaintiffs contend that full relief requires reappointment of all Associate Circuit Court judges by properly elected Circuit Court judges, we cannot extend coverage of the Voting Rights Act beyond its terms. The Voting Rights Act covers elected officials only. Associate judges are appointed officials.

Williams, 696 F. Supp. at 1568-69; *see also Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1357-58 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 2589 (1990) (considerable doubt as to whether section 2 applies to appointive offices); *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir. Unit B 1981), *aff'd mem. sub nom. Hightower v. Searcy*, 455 U.S. 984 (1982) (appointive system for school board did not implicate Voting Rights Act); *Irby v. Fitz-Hugh*, 693 F. Supp. 424, 435 (E.D.Va. 1988) (same). The Society believes that the Act was applied correctly in *Williams*, and requests that this Court say nothing in its disposition of the cases at bar to suggest that the Act applies to appointive systems such as merit selection.

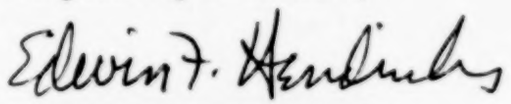
C. The Voting Right Act Should Not Be Applied To Retention Elections.

Merit selection is an appointive process, but many merit selection systems provide the public with a voice in retaining judges through popular vote. Retention elections function as a kind of popular veto, allowing the public to dismiss a judge who has already been appointed but providing voters with no right to select judges of their choice. Judges dismissed through retention elections are replaced by judges appointed by the executive through the merit-based selection process, with the voters having no voice in the candidates nominated or selected. Thus, retention elections do not deny protected classes the right "to elect representatives of their choice" within the terms of the Voting Rights Act, 42 U.S.C. § 1973 (1988). Because the retention aspect of merit selection systems is not before the Court in the present cases, the Society requests that the Court say nothing in its disposition of these cases which would suggest that retention elections are subject to the provisions of the Voting Rights Act.

CONCLUSION

For the above reasons, the American Judicature Society respectfully requests the Court not to implicate judicial choice by merit selection in its disposition of these cases.

Respectfully submitted,



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